

## **HEALTH AND SENIOR SERVICES**

### **DIVISION OF LONG-TERM CARE SYSTEMS**

### **DIVISION OF AGING AND COMMUNITY SERVICES**

#### **Standards for Licensure of Assisted Living Residences, Comprehensive Personal Care Homes, and Assisted Living Programs**

#### **Types of Services Provided to Residents; Resident Characteristics**

#### **Proposed Amendment: N.J.A.C. 8:36-4.1**

Authorized By: Clifton R. Lacy, M.D.  
Commissioner, Department of Health and Senior Services.

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5, and 26:2H-12.16 et seq.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2003-298

Submit written comments by October 3, 2003, to:

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The agency proposal follows:

#### **Summary**

The Department is proposing an amendment of N.J.A.C. 8:36-4.1 of Standards for Licensure of Assisted Living Residences, Comprehensive Personal Care Homes, and Assisted Living Programs. The purpose of the proposed amendment is to establish a regulation to ensure compliance with N.J.S.A. 26:2H-12.16 et seq. This amendment applies to any new assisted living residence or comprehensive personal

care home licensed on or after September 1, 2001, or to any existing facility of those types increasing its number of licensed beds on or after that same date.

A summary of the amendment follows:

Financially eligible individuals who require nursing facility level of care are assisted by the New Jersey Medicaid program to remain in the community as an alternative to placement in an institution. The Medicaid program renders this assistance by means of a Federally approved waiver under the authority of section 1915(c) of the Social Security Act. One class of community settings addressed by this Enhanced Community Options waiver is that comprised of assisted living residences and comprehensive personal care homes. Proposed N.J.A.C. 8:36-4.1(h) requires that a new assisted living residence or comprehensive personal care home licensed on or after September 1, 2001, attain a level of occupancy by Medicaid-eligible persons of at least 10 percent of its total bed complement within three years of licensure and that it maintain this level of occupancy thereafter. Both the implementation date and the minimum level of occupancy requirements are specifically established by N.J.S.A. 26:2H-12.16 et seq.

“Total bed complement” has been defined in the amendment as meaning the resident census, rather than the total licensed bed capacity. Consequently, facilities will not be required to base minimal Medicaid occupancy on beds that are not operational or in use. Moreover, the total bed complement of a facility will vary as the actual resident census changes.

Proposed N.J.A.C. 8:36-4.1(h) also extends the 10 percent minimum Medicaid occupancy requirement to existing facilities that increase their number of licensed beds on or after September 1, 2001. The requirement extends only to the added beds, not to the beds licensed prior to September 1, 2001. If fewer than 10 beds are added, then at least one of the additional beds must be reserved for a Medicaid-eligible person. Proposed N.J.A.C. 8:36-4.1(h)1 specifies the manner in which the 10-percent calculation is to be applied in the case of the total bed complement of new facilities and in the case of beds added in existing facilities.

Proposed N.J.A.C. 8:36-4.1(h)2 provides clarification as to which persons may be counted in determining whether the required minimum level of Medicaid occupancy has been attained or maintained by the facility. In order to be considered a “Medicaid-eligible person” for purposes of this rule, an individual shall not only have been determined as satisfying the financial eligibility criteria for medical assistance under the Medicaid program, but shall also have been assessed as being in need of nursing facility level of care and have been specifically approved for participation in the Enhanced Community Options waiver program for assisted living. It should be noted that the proposed amendment does not restrict use of the term “Medicaid-eligible person” to individuals who are admitted directly to the facility as Medicaid-

eligible. Persons who are admitted as private paying residents may later become Medicaid-eligible, and thus countable in the determination of compliance.

As the demand for assisted living and/or comprehensive personal care beds by Medicaid-eligible persons is neither constant nor uniform across the state, proposed N.J.A.C. 8:36-4.1(h)3 provides for the rule's own waiver or limitation when the Department determines this to be appropriate. In addition to being sensitive to demographic conditions, the demand is also influenced by the number of program slots available at any particular time. At times when the level of program funding necessitates use of a waiting list by the Department, the 10-percent occupancy requirement will be waived. A facility may request a waiver at other times by following the procedure specified at N.J.A.C. 8:36-2.7, which includes submission of a statement of the hardship that would result upon compliance.

In accordance with N.J.S.A. 26:2H-12.16 et seq., an assisted living residence or comprehensive personal care home operated by a continuing care retirement community (CCRC) is not affected by this amendment. The exception for CCRCs is codified at proposed N.J.A.C. 8:36-4.1(h)4.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

### **Social Impact**

Assisted living residences and comprehensive personal care homes provide residents with an opportunity to receive supportive health and social services as needed so that they may maintain their independence, individuality, privacy, and dignity in a homelike setting. In the case of many residents, these facilities offer an alternative to institutional long-term care. The Division of Long Term Care Systems has promulgated N.J.A.C. 8:36 in order to establish standards for the operation of these facilities.

The Division of Aging and Community Services administers programs which are intended to make community-based services available to individuals in need of nursing facility level of care so that these individuals may remain in the community rather than placed in a nursing facility. Accordingly, the Enhanced Community Options waiver, which has been approved by the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services, promotes the utilization of assisted living residences and comprehensive personal care homes by Medicaid-eligible persons.

Consistent with the Department's interest in fostering choice among individuals in need of nursing facility level of care, the proposed amendment at N.J.A.C. 8:36-4.1(h) would establish requirements which would ensure that, over time, at least some of the occupied licensed beds in assisted living residences and comprehensive personal care homes would be reserved for Medicaid-eligible persons approved for participation in the Enhanced Community Options waiver program for assisted living services.

### **Economic Impact**

No Medicaid beneficiaries will be negatively affected by adoption of the proposed amendment at N.J.A.C. 8:36-4.1(h). Those persons currently residing in assisted living residences and comprehensive personal care homes as beneficiaries under the Enhanced Community Options Medicaid waiver will not be affected. Individuals who are granted one of the allotted assisted living waiver slots by the Department and accepted by an assisted living residence or comprehensive personal care home at a future date will benefit financially from the funds provided by the Medicaid program to the facility for that individual. It is probable that some of these individuals will be admitted to the facility as a direct consequence of this proposed amendment.

Beneficiaries of the Enhanced Community Options Medicaid waiver for assisted living services will continue to be responsible for payment of a cost share, if applicable, and for room and board.

Although Medicaid reimbursement rates may be less than private payment rates, assisted living residences and comprehensive personal care homes should not be negatively affected by the proposed amendment. The minimum level of Medicaid occupancy required by the proposed amendment is not applied to a new facility until after the facility has been licensed for three years. The facility, therefore, would have ample time to prepare for application of the amendment. Furthermore, application of the amendment will be based on the number derived from the resident census, not on the potentially larger number of licensed beds. In the case of existing facilities, the minimum level of Medicaid occupancy will be applied only to additional beds licensed after September 1, 2001. Thus, existing facilities will be able to plan expansions with prior knowledge of the consequences of the proposed amendment.

### **Federal Standards Statement**

There are no Federal standards for assisted living. Therefore, no analysis of Federal standards is required.

### **Jobs Impact**

Utilization of licensed beds by Medicaid-eligible persons will necessitate use of staff time in the billing process. As facility personnel already participate in the billing process, any effect of the proposed amendment on the number of jobs in assisted living residences and comprehensive personal care homes should be negligible.

### **Agriculture Industry Impact**

The proposed amendment would have no impact on the agriculture industry.

### **Regulatory Flexibility Analysis**

Many of the providers of assisted living services are small businesses, as defined in the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. N.J.A.C. 8:36-4.3(b) currently requires assisted living residences and comprehensive personal care homes to submit census data to the Department on an annual basis. The proposed amendment would require that this census data now include the payor source for each resident, in order for the Department to determine compliance with the new requirements regarding Medicaid occupancy. The facilities already maintain data regarding payor source for all residents. Thus, in essence, the proposed amendment would only require the modification of the census data that is already being submitted to the Department in accordance with existing regulations. In promoting access to services in assisted living residences and in comprehensive personal care homes for beneficiaries under the Enhanced Community Options Medicaid waiver, the statute and proposed amendment do not differentiate on the basis of business size. The minimum level of Medicaid occupancy required by the proposed amendment for any particular facility, however, is based on a fixed percentage of its total bed complement or new beds added. Thus, the import of the amendment for an individual facility will be directly proportional to one reasonable measure of the facility's size. No professional services will be needed in order to comply.

### **Smart Growth Impact**

The proposed amendment would have no impact on the achievement of smart growth or implementation of the State Development and Redevelopment Plan.

**Full text** of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

8:36-4.1 Types of services provided to residents; **resident characteristics**

(a) – (g) (No change.)

**(h) In accordance with N.J.S.A. 26:2H-12.16 et seq., a new assisted living residence or comprehensive personal care home licensed on or after September 1, 2001, shall attain a level of occupancy by Medicaid-eligible persons of at least 10 percent of its total bed complement within three years of licensure and shall maintain this level of Medicaid occupancy thereafter. For the purposes of this subsection, “total bed complement” means the resident census. An existing assisted living residence or comprehensive personal care home which increases its number of licensed beds on or after September 1, 2001, shall occupy at least 10 percent of the additional beds with Medicaid-eligible persons and shall maintain this level of Medicaid occupancy thereafter.**

- 1. In cases in which either the total bed complement or the total number of beds added in an existing facility is less than 10, at least one bed shall be reserved for a Medicaid-eligible person.**
- 2. For the purposes of this subsection, “Medicaid-eligible person” means an individual who has been determined as satisfying the financial eligibility criteria for medical assistance under the Medicaid program, has been assessed as being in need of nursing facility level of care as specified at N.J.A.C. 10:63-2.1, and has been approved by the Department for participation in the Federally approved Enhanced Community Options waiver program for assisted living services. “Medicaid-eligible person” includes:**
  - i. Persons who were admitted to the facility as private paying residents and subsequently became eligible for Medicaid; and**
  - ii. Persons who were admitted directly to the facility as Medicaid-eligible.**

3. The Commissioner or his or her designee may waive or reduce this 10-percent Medicaid occupancy requirement for some or all regions of the State if it is determined that sufficient numbers of licensed beds are available in the State to meet the needs of Medicaid-eligible persons within the limits of the Federally approved Enhanced Community Options waiver as it pertains to assisted living services.
- i. The Commissioner or his or her designee shall waive this 10-percent Medicaid occupancy requirement if limitations on funding result in the Department establishing a waiting list for Medicaid-eligible persons requesting assisted living services through the Enhanced Community Options waiver.
- ii. A licensed assisted living residence or comprehensive personal care home may submit a written request for a waiver of the 10-percent Medicaid occupancy requirement in accordance with N.J.A.C. 8:36-2.7.
4. In accordance with N.J.S.A. 26:2H-12.16 et seq., this subsection shall not apply to an assisted living residence or a comprehensive personal care home operated by a continuing care retirement community (CCRC), as defined at N.J.A.C. 8:36-1.3.